IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

SUIT NO.1368 OF 1989

Shripat Shankar Panchal
of Bombay, Indian Inhabitant,
residing at Gundavali Gaothan,
Near Ujala Sewa, Committee,
Azad Road, Andheri (East),
Bombay 400 069. Plaintiff

vs.

The Municipal Corporation for
Greater Bombay, having its office
at Mahapalika Marg, Mahapalika
Building, Fort, Bombay 400 001. Defendants

Mr.Mishra i/b.Mr.O.A.Pandey for the plaintiff.

Mr.U.J. Makhija with Mr.R.Y.Sirsikar for the defendants.

**CORAM : ANOOP V. MOHTA,J.**

**DATE OF RESERVING THE JUDGEMENT: : 13th June, 2007**

**DATE OF PRONOUCING THE JUDGEMENT : 02.08.2007.**

**JUDGMENT**.

The plaintiff has filed the present suit for a sum of Rs.4,00,000/- (Rupees four lacs ) along with interest at the rate of 6% p.a. from the date of filing of the suit against the defendants-Municipal Corporation for Greater Bombay (for short, "M.C., Bombay" for damages/compensation towards their negligence as his son lost his life as he fell into the open manhole of the gutter at service road, Andheri on 16.4.1987.

2. The deceased was the son of the plaintiff aged 11 years by name Sunil. He was studying in school. On

16.4.1987 at about 5.30 p.m. to 6 p.m. the deceased while playing with other boys fell into the uncovered hole of the gutter at the side of the road at Andheri. As noted, that people were gathered near the ditch/hole and some one removing the body of the deceased and taken to Holy Spirit Hospital where he was declared dead before admission by the Doctor on duty.

3. A complaint was lodged at Andheri Police Station which was registered as ADR-28/87. The spot panchanama was prepared. There was no specific complaint or allegation of any foul play against any person.

4. The plaintiff in this background lodged a notice under Section 527 of the Bombay Municipal Corporation Act, 1888 on 17.7.1987 and thereby claimed Rs.4,00,000/- towards compensation and damages based on the sheer negligence on the part of the officials of M.C., Bombay as alleged. There was no reply to the said notice.

5. The plaintiff, therefore, filed Pauper Petition No.5 of 1988 along with the Suit.

6. The defendants resisted the claim and pleading by written statement dated 30th December, 2003 and basically contended that a wooden board was fixed near the ditch with writing the word "Danger" and around the

said board, two empty drums were lying and further there was guard since morning upto 4 p.m. and further contended that it was not possible for the Corporation to keep security or vigilance for 24 hours at the site where the work was going on. It is also stated that it was moral responsibility of the parents as well as the public or citizens to support Corporation while discharging their duties which is at the interest of the public at large. It is also the duty of the parents and citizens to see that they do not visit near construction site and keep their children away from the site. The defendants further admitted that it is the duty of the defendants to look after and maintaining each and every manhole and same duty was discharged by the defendant's staff at the relevant time. It is further pleaded that it is not possible for the defendants to keep vigilance and/or security on each and every manhole which are in the city of Mumbai, which is practically impossible. The defendants have also resisted the contents of the panchanama. They further denied that they raised technical objection about the notice under section 527 also as it was issued only in the name of Municipal Corporation. They thereby denied the claim of Rs.4,00,000/-.

7. The plaintiff has filed affidavit of documents. The issues were framed on 20.7.2004 as under:

"1. Does plaintiff prove that on 16.4.1987 his son master Sunil fell into the man hole and died as alleged in para 2 of the plaint?

2. Does the plaintiff prove that the accident occurred due to the negligence of the defendant as alleged in para 2 of the plaint?

3. Whether the plaintiff failed to give a notice under section 527 of the B.M.C. Act and the suit is therefore liable to be dismissed as alleged in para 1 of the written statement?

4. Does the plaintiff prove that he is entitled for compensation from the defendants to the tune of Rs.4,00,000/- (Rupees four lakhs only), with interest therein at the rate of 6% per annum from the date of the filing of the suit till payment as alleged in para 8 of the plaint?

5. To what order or relief, if any, is the plaintiff entitled to?"

8. The plaintiff has led the evidence of himself and one Ms.Vidya Ghodse, (PW 2), one Jaiprakash Sawant (PW 3) in the locality. The defendants did not lay any

evidence.

**Issue No.1:**

9. The plaintiff has placed on record documents basically the School Leaving certificate (P-2), report of death due to drowning of Holy Spirit Hospital (P-3), Post-mortem report issued by Dr.R.N.Cooper Hospital (P-4), Letter from Dean on duty, Holy Spirit Hospital, Bombay (P-5), Certificate issued by Medical Officer of Additional Corner Court Juhu Bombay (P-6), Certificate of Death of the deceased (P-7), Acknowledgement from Andheri Police Station (P-8-A), Police report along with panchanama (P-8-B), Plaintiff's Advocate's notice dated 17.7.1987 (P-9). All these documents filed by the plaintiff are marked by consent of the parties.

10. The evidence led by the plaintiff himself as well as other witnesses is sufficient to confirm and basically as there is no dispute about the same shows that on 16.4.1987 his son Master Sunil fell in the manhole and died as alleged in para 2 of the plaint.

**Issue No.2:**

11. The plaintiff has stated in the evidence that near his house, there is a service road and M.C., Mumbai was

carrying on some repair work of the manhole of the gutter at service road from 1.4.1987; that officers of the defendants have kept manhole of the gutter open, as the repair of the manhole was in progress. As the manhole remained open without any notice board and without keeping any red colour flag and/or without any security guards and because of this his son fell down in the manhole and lost his life. At about 7.40 p.m. his son while playing along with his friends fell down in the manhole which was full of water and died and thereafter taken to the Hospital where Doctor on duty declared him dead. On 17.4.1987 dead body of the deceased handed over for post-mortem to R.N.Cooper Hospital Juhu Mumbai who later on issued report of death which is also part of record. The medical officer's report of Additional Coroner of Juhu,Mumbai (Ex.4) further shows that the death was due to drowning. The death certificate issued by the Municipal Corporation of Greater Mumbai confirm the death of the deceased. There is no dispute that Andheri Police Station has registered the case as ADR-28/1987. The panchanama was also drawn accordingly. The said report along with panchanama also part of the record. The plaintiff further stated that at about 7.45 p.m. he heard that his son fell into the ditch/manhole while playing as he was in the house which is 15 minutes away from the spot rushed to the location and found that one Mr.Chavan and Mr.Shetty removed the

dead body from the water and then they took the deceased to Holy Spirit Hospital for medical treatment, where the Doctor declared him dead. One Vasudeo and one Mr.Balwender Singh have also given their statement before the police. The ditch/manhole was admeasuring 7 ft. x 20 ft. situate at the right side of the road having full water in it. In the cross-examination the defendants unable to shake the evidence of the plaintiff. They only able to extract from the plaintiff that he had seen the work in progress at the manhole two days prior to the incident. Some different timings of incident were reflected. The plaintiff has re-iterated and re-affirmed his case.

12. The other witness Ms.Vidya Ghadse (PW-2) has supported plaintiff's case. Her house, as stated, is 10 feet away from the place of incident which took place at 7.45 p.m. on 16.4.1987; the deceased was playing on the road along with some other boys. He fell down and shouted for help. She has stated that at the time of incident there was no watchman of the M.C., Mumbai on the spot. For 4 to 5 days the watchman was present on the spot, but on the day of the incident, no-one was present. She has further stated that there was no barricade around the ditch. There was a heap of mud on one side of the ditch. The ditch was at the side of the road. There was no danger signal displayed at the spot

by the BMC. She has further confirmed that she had not seen any danger signal at any time on the spot while the work was in progress. The security guards were posted at the spot by the BmC day and night. She has told further that the day of the incident, the watchman was present upto 4.30 p.m. immediately after the incident after hearing the noise she shouted and one Sanjay Chavan taken out the deceased from the manhole/ditch. She has further stated that the police had recorded her statement. She, however, admitted that it was dark at the time of the incident. The width of the road was about 20 to 25 feet. The road was a service road. The ditch was between the service road and high-way. The boys used to play regularly on the road and even used to take dip in the ditch. Considering all, this witness suppported the case of the plaintiff in all respects.

13. One Jayprakash M.Sawant, who was residing at the locality, after hearing a shout from girl that some child had fallen into the pit, he rushed to the spot and removed the child. The pit was filled with water. He further stated that the said pit was dug up a few days back by the BMC staff. Thereafter watchman was posted on the spot, but on the day of the incident, no watchman was present. He further confirmed that the child was dead when he was taken to the Hospital by his parents. In the cross-examination, he has stated that his room is

about 30 feet away from the spot of the incident. His statement was also recorded by the police on the same day. He further stated that the pit was about 7 to 8 feet deep and full of water. He further confirmed that parents of the child accompanied by Shetty taken the boy to the Holy Spirit Hospital. He denied that he had told the police that the boy while playing on the spot had fallen into the pit.

14. Taking all this evidence into consideration read with the documents placed on record the facts which are clear are:

(a) that there was no watchman at the relevant time near the spot of the incident/manhole/ditch/pit;

(b) there was no protective measure by the BMC staff while leaving the spot uncovered, specially when that was a service road and boys used to play regularly near the manhole in question;

(c) there was no gurgle or any boundary marked or protected surrounding the manhole either with red tape or light basically when the work was in progress;

(d) the manhole size was 7 to 10 feet and 8feet deep and it was only full of water and, therefore, the BMC staff

ought to have taken special care to protect the area from all angle apart from the red tapes protected border road light should have been placed and/or put so that whosoever passes by come near the said manhole are away and/or should know that there is a big ditch and work is still in progress to avoid any fall or accident;

(e) The boy/deceased fell into the ditch when there was no watchman and as there was no proper protective measure taken by the M.C., Mumbai;

(f) The death caused because of drowning;

(g) the age of the deceased was 11 years and

(h) the deceased was not earning member of the family at that time.

15. Mere denial by the defendants and/or resisting such claim and averments without leading any evidence in support of their case, is sufficient to draw adverse inference against the defendant-Corporation. There is no material to support their case that there was no negligence and/or their staff were not negligent while leaving the manhole uncovered and/or unprotected. The case that in the police report there was a reference made to a board mentioning the word "Danger" put up on

one side is also remained unproved specifically when the plaintiff has stated positively in the pleading as well in the evidence through their witnesses that there was no mark or protective measures and/or steps taken by the Corporation while leaving the spot unattended on the date of the incident. The Corporation further failed to prove their case that they have provided 24 hours guards on the spot. There is ample support by the co-witneses of the plaintiff, PW 2 and PW 3 that there was no watchman at the relevant time when the incident happened. The Corporation's staff were fully aware that the boys from the locality used to play on the road after evening hours. The Corporation, therefore, should have taken more care to protect these areas knowing the nature of the locality and the condition of service road which was near the highway. The submission and/or pleading as raised that it is not possible for the Corporation to take care of such uncovered manholes and/or ditches is untenable and unacceptable. The duties of citizens and/or parents to take care and protect their own child or children is correct, but that itself, in the facts and circumstances of the case, is in no way sufficient for the Corporation to shirk their responsibility to take all necessary measures and take effective steps to prevent such accidents. It is their legal duty to protect and guard such areas where work is in progress from all angle, taking into consideration

the locality, the density of population, the frequency of visitors. It should be continued for 24 hours until the work of such repair and/or digging is over, whether it is day or night. A mind in common sense expect that such officers or any such person after leaving and/or closing the work which is in progress should take all necessary measures to see that there should be no accident and therefore to keep guard only at some hours and left the spot uncovered and unprotected at night itself is a case of clear negligence from the side of staff of the BMC. The contention that the Corporation while working on such roads and/or repairing such roads and/or gutters are under no obligation to take care and/or protect the citizen from accident is untenable. The Corporation while performing their obligation as contemplated under the BMC Act or even otherwise bound to take care and protect the rights of the citizen which includes to prove all measures and/or to take steps to see that there no accident happens while their respective repair work is in progress. For that no specific provision and/or regulation is required. The pleading as raised and as contended, shirking their responsibility and just putting all responsibility on the parents like the plaintiff is absolutely unjust, unfair and uncalled for. The public body like the Corporation cannot act and behave like this in such arbitrary and in highhandedness.

16. In all respect, in my view, the plaintiff has proved that the accident occurred due to the negligence of the defendants.

**Issue No.3:**

17. There is no dispute that the notice was issued and received by the defendants. The Suit is against the Municipal Corporation of Greater Bombay. The notice under Section 527 was issued in the name of Commissioner of Municipal Corporation. Such notice, therefore, cannot be said to be bad in law on such technical pleas as raised by the Corporation that it is not proper notice to the Corporation. The fact that inspite of receipt of the notice, they failed to reply to the same and the fact that there was notice given before filing the present Suit for Rs.4,00,000/- with interest just cannot be overlooked,. The notice is therefore valid.

The Suit is maintainable.

**Issue No.4:**

18. The age of the deceased was 11 years. He was brilliant and smart child of the plaintiff. He was not earning member at the relevant time. The question is a lumpsum compensation as prayed/claimed by the plaintiff

in the absence of any guidelines or formula, whether can be granted by this Court.

19. The learned counsel for the defendants submitted that under the BMC Act they do not have any provision to pay any claim such as no fault liability and/or lumpsum amount to the parents or any person related to the deceased who died in such accident or incident, whether it is because of negligence or no negligence of the Corporation. In the present case, as referred above, there is a negligence of the defendants which resulted into the loss of son of the plaintiff.

20. The learned counsel appearing for the plaintiff has strongly relied on **H.S.E.B. & ors. v. Ram Nath & ors., 2004 (5) SCC 793** whereby the Supreme Court has granted compensation of Rs.1 lakh because of death of a child, as a result of coming into contact with a high-tension wire which passed over the roof of the house. The said compensation was awarded in the petition filed under Article 226 of the Constitution of India as there was no disputed question of facts arise. The Apex Court further observed that it is the duty of the State Electricity Board and/or such authorities to ensure that the electricity wires were at a safe distance from the building, even if it were unauthorised or illegal. The Apex Court further observed that they

would have to ensure that no injury results from their activities. Therefore, merely because the house where incident occurred was unauthorised that itself cannot be the reason that local authorities should not take care to ensure that no injuries result from their activities. In the present case, the submission that the boys themselves were playing near the ditch and/or they used to take dip in the said manhole that itself cannot be the reason for the Corporation to ensure that no injury should result from their inactivities and/or such body first of all should ensure that their activities should not cause damage or injury to any citizen. It is their duty to take care and to take effective steps at all stages while work in progress just cannot be shirked or avoided by the BMC.

21. In **Lata Wadhwa & ors. v. State of Bihar & ors., AIR 2001 SC 3218,** the Supreme Court has considered in detail the compensation for death of child of age group of 10 to 15 years studying in Class VI to X who died in fire that took place in TISCO functions, awarded the compensation of Rs.4 lacs to Rs.10 lacs to every claimant. The Apex Court has further observed even for the death of house wife in fire accident for the value of service rendered by her to house even though was not working, on modest estimation should be Rs.3000/- per month for the age group of house wife between 34 to 59

years and for elderly house wife 60 to 70 years age group, the service should be valued to Rs.20,000/- p.a.

The Apex Court has further observed as under:

> "..... In examining the question of damages for personal injury, it is axiomatic that pecuniary and non-pecuniary heads of damages are required to be taken into account. In case of pecuniary damages, loss of earning or earning capacity, medical, hospital and nursing expenses, the loss of matrimonial prospects, if proved, are required to be considered. In the case of non-pecuniary losses, loss of expectation of life, loss of amenities or capacity for enjoying life, loss or impairment or loss of anatomical structures or body tissues, pain and suffering and mental suffering are to be considered. But for arriving at a particular figure on each of the aforesaid head, the claimant is duty bound to produce relevant materials, on the basis of which, a determination could be made, as to what would be the best compensation. A bare perusal of the report of Shri Justice Chandrachud, bear testimony to the fact that the claimants did not discharge their obligations by putting the relevant materials to enable Shri Justice Chandrachud to arrive at the quantum of compensation. Determination of compensation in such cases is an upheaval task, more so, when no material is produced at all. In such circumstances, we must say that Shri Justice Chandrachud has shown maximum sympathy and has determined the compensation to the maximum extent possible, which is also not objected to by the Company. We, therefore, do not find any justification for our interference with the quantum arrived at and enhancing the compensation, in respect of the injured persons, who suffered the burn injury on account of the tragic incident. It is true that persons having burn injury to the extent of 10% and below, have not been awarded any compensation and, therefore, we, as a matter of compassion, award a lump-sum of Rs.two lakhs in favour of each of those persons."

22. This Court has asked the counsel for

respondent-corporation to settle the matter and/or to pay the reasonable compensation either lumpsum or otherwise. As there are no rules,regulations or guidelines or any power under the B.M.C.Act, the respondent's official unable to accept the suggestion. This, however, cannot be the reason to overlook the damages or compensation for physical shock, pain and suffering already suffered or likely to be suffered in future by the parents of the deceased. The inconvenience, hardship, discomfort, dis-appointment, frustration, continued mental stress in life because of this loss is also very material aspect while considering to grant compensation. Any amount of compensation cannot be equated with the human suffering or personal deprivation in such circumstances. Money is no good to the parents who lost son. In this background, I am of the view that this Court have to do the best they can and award what they think is just, reasonable and fair. Therefore, it is necessary to work-out a pattern and method specially in the absence of any guidelines, rules and regulations to award and/or ascertain the compensation depending upon the facts and circumstances of each case.

23. In the case of **Mediana, (1900) AC 113, Lord Halsbury** held:

"Of course the whole region of inquiry into

> damages is one of extreme difficulty. You very often cannot even lay down any principle upon which you can give damages; nevertheless, it is remitted to the jury, or those who stand in place of the jury, to consider what compensation in money shall be given for what is a wronglful act. Take the most familiar and ordinary case: how is anybody to measure pain and suffering in moneys counted? Nobody can suggest that you can by any arithmetical calculation establish what is the exact amount of money which would represent such a thing as the pain and suffering which a person has undergone by reason of an accident. But, nevertheless, the law recognises that as a topic upon which damages may be given."

24. In **Perry v. Cleaver, 1969 ACJ 363 (HL, England),**

**Lord Morris of Borth-y-Gest** held thus:

> "(31)... To compensate in money for pain and for physical consequences is invariably difficult but.... no other process can be devised than that of making a monetary assessment....."

25. In **Concord of India Insurance Co. Ltd. v.**

**Nirmala Devi, 1980 ACJ 55 (SC),** the Apex Court held:

> "(2).... the determination of the quantum must be liberal, not niggardly since the law values life and limb in a free country in generous scales...."

26. The question still remains therefore, in the absence of any material on record to justify the compensation of Rs.4 lakhs as claimed as admittedly there is nothing to arrive at a lump-sum figure even Rs.4 lakhs on record.

27. This is a case of accident resulted because of negligence of the Municipal Corporation as recorded above. It is difficult to judge and/or assess the future income of the deceased who was aged about 11 years old at the relevant time. The plaintiff at the relevant time was working in the Mill where he was getting salary of Rs.1500/- to Rs.2000/- p.m. Therefore, this facet itself is not sufficient to assess the compensation as claimed.

28. In this background, immediate formula which according to me is available in such unguided and uncleared situation is to apply the principle of Motor Accidents Claims as contemplated. The Apex Court in **Manju Devi & anr. v. Musafir Paswan & anr., 2005(1) TAC 609 (SC),** while considering the quantum of compensation based on the assessment of the just compensation in the case of death of boy aged 13 years granted the compensation to the parents taking the assistance of 2nd Schedule to the Motor Accident Act, 1988, Section 66, as income of non-earning member was a sum of Rs.15,000/- p.a. and applied the multiplier of 15 and enhanced the compensation from Rs.90,000/- to Rs.2,25,000/-.

29. Therefore, taking note of this and as there is no guidance provided and/or material available, in the

facts and circumstances of the case and therefore, taking into consideration the future income of non-earning member like the deceased a sum of Rs.15,000/- per annum with multiplier of 15 is sufficient to apply and to assess and grant the compensation as claimed. Applying this, compensation comes to Rs.2,25,000/-. This is however subject to 1/3rd reduction as the victim could have incurred towards himself. Therefore Rs.2,25,000/- - Rs.75,000/- = Rs.1,50,000/- (One lakh and fifty thousand only). This would be just and fair compensation taking into consideration basic aspects of pecuniary as well as non-pecuniary damages.

30. In the result, the plaintiff is entitled for a lumpsum compensation of Rs. 1,50,000/- with interest at the rate of 6% p.a. from the date of the filing of the Suit till payment.

**Issue No.5:**

31. In view of the above, the Suit is partly decreed as under:

**ORDER**

. The Suit is decreed in favour of the plaintiff for compensation from the defendants to the tune of Rs.

Rs.1,50,000/- with interest at the rate of 6% p.a. from the date of the filing of the Suit till payment. The Suit is allowed with costs.

[ANOOP V. MOHTA,J.]